

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

VJ COMPOUNDING CORPORATION, d/b/a)
L. CARLTON MERTZ, CO., an Illinois)
Corporation,)
Plaintiff,) Case No. 08 CV 1738
v.) Judge Matthew Kennelly
SENECA INSURANCE COMPANY, INC. a) Magistrate Judge Susan Cox
subsidiary of SENECA INSURANCE GROUP,)
INC. a Delaware Corporation,)
Defendant.)

DEFENDANT'S AMENDED AFFIRMATIVE DEFENSES

NOW COMES the Defendant, Seneca Insurance Company, Inc., by and through its attorneys, O'Hagan Spencer LLC, for its Amended Affirmative Defenses to the Plaintiff's Complaint at Law, states as follows:

AMENDED AFFIRMATIVE DEFENSES

1. Plaintiff's Complaint fails to state a claim against Defendant upon which relief can be granted in Illinois for the following:

- a. There is no claim for bad faith tort action under the Illinois common law and/or 215 ILCS 5/155.
- b. ‘Going out of business’ is not a covered loss under the Policy;
- c. There are no damages claimed in excess of the amount paid to date by Insurer, which is not more than \$150,000.

2. Plaintiff did not and has not satisfied the Conditions of the Policy No. ESP 14 024 50, including, but not limited to, The Common Policy Conditions Form contained in the Policy, which provides, in pertinent part, that:

All Coverage Parts included in this policy are subject to the following conditions.

* * *

C. Examination Of Your Books And Records

We may examine and audit your books and records as they relate to this policy at any time during the policy period and up to three years afterward.

The Building and Personal Property Coverage Form contained in the Policy provides, in pertinent part, that:

E. LOSS CONDITIONS

The following conditions apply in addition to the Common Policy Conditions and the Commercial Property Conditions.

* * *

3. Duties In The Event Of Loss Or Damage

- a.** You must see that the following are done in the event of loss or damage to Covered Property:

* * *

- (5)** At our request, give us complete inventories of the damaged and undamaged property. Include quantities, costs, values and amount of loss claimed.

- (6)** As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

- (7)** Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request.

We will supply you with the necessary forms.

(8) Cooperate with us in the investigation or settlement of the claim.

b. We may examine any insured under oath, while not in the presence of any other insured and at such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records.

The Policy's Business Income (And Extra Expense) Coverage Form, provides, in pertinent part, that:

* * *

C. Loss Conditions

The following conditions in addition to the Common Policy Conditions and the Commercial Property Conditions

* * *

2. Duties In The Event Of Loss

a. You must see that the following are done in the event of loss:

* * *

(5) As often as may be reasonably required, permit us to inspect the property proving the loss or damage and examine your books and records.

Also permit us to take samples of damaged and undamaged property for inspection, testing and analysis, and permit us to make copies from your books and records.

(6) Send us a signed, sworn proof of loss containing the information we request to investigate the claim. You must do this within 60 days after our request. We will supply you with the necessary forms.

(7) Cooperate with us in the investigation or settlement of the claim.

* * *

b. We may examine any insured under oath, while not in the presence of any other insured and as such times as may be reasonably required, about any matter relating to this insurance or the claim, including an insured's books and records. In the event of an examination, an insured's answers must be signed.

VJ Compounding has violated the foregoing provisions of the Policy by failing to give costs, values and amounts of the losses claimed; provide books and records for examination; provide a proof of loss containing information requested to investigate the claim; return signed examination answers; and cooperate in the investigation of the claim.

3. The roof collapse was caused by obvious rust and decay of which the Insured had prior notice and failed to maintain. Plaintiff made prior attempts to repair the roof, but the repairs were not done in the areas where the collapse occurred. Such rust and decay is excluded from coverage by the Policy, which states:

B. Exclusions

2. We will not pay for loss or damage caused by or resulting from any of the following:

d. (1) wear and tear;
(2) Rust and other corrosion, decay, deterioration, hidden or latent defect or any quality in property that causes it to damage or destroy itself;

4. Plaintiff has knowingly submitted fraudulent claims with intent to defraud Seneca, and has submitted documentation and checks to Defendant to support his fraudulent claim, and/or was otherwise fraudulent in the following ways:

a. The insured submitted \$15,500 for eyewash for the temporary location, but no evidence that eye wash was in original location and/or was lost in the roof collapse.

b. The insured submitted claims for fixing the sump pump and drains, but admitted at his March 9, 2005 Examination Under Oath that the sewer was plugged before the loss and was full prior to the loss.

c. The insured submitted loss for thousands of dollars in lost goods

and inventory, but was unable to substantiate that lost goods submitted were damaged in the roof collapse and some claimed lost goods were not in area where loss occurred.

- d. The insured submitted claims for electrical work, which he admitted at his March 9, 2005 EUO was not a part of the loss and had already made a prior insurance claim for the electrical breakdown.
- e. The insured submitted claims for AT & T phone bills, which he admitted at his March 9, 2005 EUO was not a part of the loss.
- f. The Insured submitted three separate proofs of losses, attached as Group Exhibit A are exhibits 100, 102 and 103, all of which claimed different amounts for the loss.
- g. The insured submitted claims with checks to Rudy Milo without supporting documentation for all amounts paid to Milo and could not be specific about over \$18,000 paid to Milo and submitted as claims.
- h. The Insured submitted bills from Beaver Oil for removal of totes of liquid as part of its claim, but admitted at his March 10, 2005 EUO that the totes of liquid existed prior to the loss.
- i. The Insured submitted claims for tires for the Caterpillar, but testified at his March 10, 2005 EUO that he could not say the tires were damages in the loss.
- j. The Insured submitted as part of claim, 35 pounds of material in Silo and removal and replacement of Silo without documentation of material and costs of material in Silo at time of loss and failure to acknowledge that if Silo cleaned out, there was no need to submit a claim to replace Silo.
- k. Submitted claims for total work done by contractor to fix the roof, William H Cooper, which includes water leaks and other roof repairs unrelated to the loss.
- l. The insured submitted numerous checks allegedly paid to William H Cooper without supporting invoices, some of which had never been cashed by William H Cooper.
- m. The insured submitted numerous checks written to cash and to Vishnu Gor, which are unsubstantiated and unsupported by invoice or other explanation of what payments for.

WHEREFORE the Defendant, SENECA INSURANCE COMPANY, INC., respectfully requests that this Honorable Court enter an Order in its favor and against the Plaintiff, VJ COMPOUNDING CORPORATION, d/b/a L. CARLTON MERTZ, CO., an Illinois Corporation, denying and dismissing its Complaint at Law.

Dated: June ____, 2008

Respectfully Submitted:

SENECA INSURANCE COMPANY

By: s/ James J. O'Hagan.

James J. O'Hagan (ARDC No. 2094754)

Jamie L. Filipovic (ARDC No. 6278943)

O'Hagan Spencer, LLC

One E. Wacker Drive

Suite 3400

Chicago, Illinois 60601

Telephone: (312) 422-6100

Facsimile: (312) 422-6110

E-mail: johagan@ohaganspencer.com

ATTORNEYS FOR DEFENDANT

SENECA INSURANCE COMPANY, INC.

GROUP EXHIBIT A

EXHIBIT

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SWORN STATEMENT IN PROOF OF LOSS

\$ 2,500,000
AMOUNT OF POLICY AT TIME OF LOSS

ESP 14 024 50

POLICY NUMBER

RBN & Assoc.

AGENCY AT

Richard T. Scodro

AGENT

Oct. 1, 2003

DATE ISSUED

Oct. 1, 2004

DATE EXPIRES

To the Seneca Insurance Company, Inc.
of New York, New York

At time of loss, by the above indicated policy of insurance you insured

V. J. Compounding d/b/a L. Carlton Mertz Co.against loss by "Special Form," see policy to the property described under Schedule "A," according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.1. Time and Origin: A property damage and business income loss occurred about the hour of 8:45 a.m. on the 5 day of March 2003. The cause and origin of the said loss were: partial roof collapse

leading to water damage

2. Occupancy: The building described, or containing the property described, was occupied at the time of loss as follows, and for no other purpose whatever:

contract packaging operations3. Title and Interest: At the time of the loss the interest of your insured in the property described therein was lessee. No other person or persons had any interest therein or incumbrance thereon, except: Ravi Corporation, as lessor4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: contract packaging operations ceased on November 30, 2004.5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 2,500,000 as more particularly specified in the apportionment attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or invalid.6. The Actual Cash Value of said property at the time of the loss was \$7. The Whole Loss and Damage was \$ 2,100,000.008. Less Amount of Deductible \$ 5,000.009. The Amount Claimed under the above numbered policy is \$ 1,666,000.00

The said loss did not originate by any act, design or procurement on the part of your Insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of ILLINOISCounty of DUPAGE

Subscribed and sworn to before me this

7th day of DECEMBER 2005Cathy S. Brown

Notary Public

V. J. Compounding d/b/a L. Carlton Mertz Co.BY: Vishwan Mertz Insured

"OFFICIAL SEAL"

CATHY S. BROWN
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 6/13/2009

"Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime."

(OVER)

08 04 10136a MERTZ

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SWORN STATEMENT IN PROOF OF LOSS

\$ 2,500,000
AMOUNT OF POLICY AT TIME OF LOSSOct. 1, 2003

DATE ISSUED

Oct. 1, 2004

DATE EXPIRED

To the SENECA INSURANCE CO. INC. NEW YORK, N.Y.At time of loss, by the above indicated policy of insurance you insured
At time of loss, by the above indicated policy of insurance you insuredVIA complainting DRA L. CARLTON MERTZ CO.against loss by SPECIAL FORM SEE POLICY to the property described under Schedule "A," according to the
terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.1. Time and Origin: A PROP. DAMAGE BLDG. LOSS INCOME LOSS loss occurred about the hour of 5 o'clock A M.,
on the 5 day of 2004. The cause and origin of the said loss were Partial Roof Collapse

LEADING TO WATER DAMAGES

2. Occupancy: The building described, or containing the property described, was occupied at the time of loss as follows, and for no other purpose whatever:

CONTRACT PACKAGING OPERATIONS

3. Title and Interest: At the time of the loss the interest of your insured in the property described therein was lessor lessee
No other person or persons had any interest therein or in connection therewith.except: LEVI COOP. EX-TO Lessor4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure
of the property described, except CONTRACT PACKAGING OPERATIONS CANCELLED ON
Oct. 1, 2004 Nov. 10, 20045. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 2,500,000
as more particularly specified in the endorsement attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or
invalid.6. The Actual Cash Value of said property at the time of the loss was \$ TO BE DETERMINED
7. The Whole Loss and Damage was \$ 4,094.751
8. Less Amount of Deductible \$ 5,000
9. The Amount Claimed under the above numbered policy is \$ 1,094.751The said loss did not originate by any act, design or procurement on the part of your insured, or this agent; nothing has been done by or with the privity or
consent of your insured or this agent, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such
as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to defraud the said company, as to
extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of IllinoisL. CARLTON MERTZ CO.County of CookBY: Karen Kernbauer Notary Insured

Subscribed and sworn to before me this

8th day of December 2004Karen Kernbauer

Notary Public

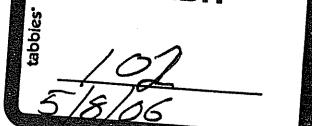
"OFFICIAL SEAL"

KAREN KERNBAUER

NOTARY PUBLIC STATE OF ILLINOIS

My Commission Expires 05/15/2008

(OVER)

"Any person who knowingly and with intent to defraud any insurance company or other person, files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any transaction, commits a violation of the Fraudulent Insurance Act, which"**EXHIBIT**

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SWEORN STATEMENT IN PROOF OF LOSS

\$ 2,500,000.00
 AMOUNT OF POLICY AT TIME OF LOSS
 10/01/2003
 DATE ISSUED
 10/01/2004
 DATE EXPIRES

SENECA INSURANCE COMPANY, INC.
 160 WATER STREET, 16TH FLOOR
 NEW YORK, NY 10038
 Claim #: 4CCN031

ESP 14 024 50
 POLICY NUMBER
 Chicago, IL
 AGENCY AT
 Travis-Pedersen
 AGENT

To the Seneca Insurance Company
 of 160 Water Street, NY, NY 10038

At time of loss, by the above indicated policy of insurance you insured

VJ Compounding, Inc d/b/a L. Carlton Mertz. Co., and Ravi Co

6147 West 65th Street, Chicago, IL 60638

against loss by Collapse to the property described under Schedule "A," according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

1. Time and Origin: A Collapse STATE KIND loss occurred about the hour of _____ o'clock _____ M.,

on the 03 day of March 2004. The cause and origin of the said loss were: Collapse

2. Occupancy: The building described, or containing the property described, was occupied at the time of loss as follows, and for no other purpose whatever:

Manufacturing Facility

3. Title and Interest: At the time of the loss the interest of your insured in the property described therein was Owner No other person or persons had any interest therein or incumbrance thereon, except None

4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: None

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 2,500,000.00 as more particularly specified in the apportionment attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Actual Cash Value of said property at the time of the loss was \$ _____

7. The Whole Loss and Damage was \$ _____

8. Less Amount of Deductible \$ _____

9. The Amount Claimed under the above numbered policy is Advance for building shoring and stabilization \$ 15,000.00

The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of _____

Vishnu Gop

County of _____

BY: VISHNU GOP 4/01/04 Insured

Subscribed and sworn to before me this _____ day of _____ 20 _____

Notary Public

witnessed by Gregory A. Capone
Signature

(OVER)

"Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime."

SWEORN STATEMENT IN PROOF OF LOSS

\$ 2,500,000.00
 AMOUNT OF POLICY AT TIME OF LOSS
 10/01/2003
 DATE ISSUED
 10/01/2004
 DATE EXPIRES
 To the Seneca Insurance Company
 of 160 Water Street, NY, NY 10038
 At time of loss, by the above indicated policy of insurance you insured

SENECA INSURANCE COMPANY, INC.
 160 WATER STREET, 16TH FLOOR
 NEW YORK, NY 10038
 Claim #: 4CCN031

ESP 14 024 50
 POLICY NUMBER
 Chicago, IL
 AGENCY AT
 Travis-Pedersen
 AGENT

VJ Compounding, Inc d/b/a L. Carlton Mertz, Co., and Ravi Col

6147 West 65th Street, Chicago, IL 60638

against loss by Collapse to the property described under Schedule "A," according to the terms and conditions of the said policy and all forms, endorsements, transfers and assignments attached thereto.

1. Time and Origin: A Collapse loss occurred about the hour of _____ o'clock M.,
 on the 03 day of March 2004. The cause and origin of the said loss were: Collapse

2. Occupancy: The building described, or containing the property described, was occupied at the time of loss as follows, and for no other purpose whatever:

Manufacturing Facility

3. Title and Interest: At the time of the loss the interest of your insured in the property described therein was
 Owner No other person or persons had any interest therein or incumbrance thereon,
 except: None

4. Changes: Since the said policy was issued there has been no assignment thereof, or change of interest, use, occupancy, possession, location or exposure of the property described, except: None

5. Total Insurance: The total amount of insurance upon the property described by this policy was, at the time of the loss, \$ 2,500,000.00 as more particularly specified in the apportionment attached under Schedule "C," besides which there was no policy or other contract of insurance, written or oral, valid or invalid.

6. The Actual Cash Value of said property at the time of the loss was \$ _____

7. The Whole Loss and Damage was \$ _____

8. Less Amount of Deductible \$ _____

9. The Amount Claimed under the above numbered policy is Advance payment for BI & EE Loss \$ 50,000.00

The said loss did not originate by any act, design or procurement on the part of your insured, or this affiant; nothing has been done by or with the privity or consent of your insured or this affiant, to violate the conditions of the policy, or render it void; no articles are mentioned herein or in annexed schedules but such as were destroyed or damaged at the time of said loss; no property saved has in any manner been concealed, and no attempt to deceive the said company, as to extent of said loss, has in any manner been made. Any other information that may be required will be furnished and considered a part of this proof.

The furnishing of this blank or the preparation of proofs by a representative of the above insurance company is not a waiver of any of its rights.

State of _____

County of _____

Subscribed and sworn to before me this _____ day of _____ 20 _____

Vishnu G
 BY: VISHNU GOR 4/01/04 Insured

Notary Public

Witnessed by Gregory S. Caporaso
Gregory S. Caporaso
Notary Public

"Any person who knowingly and with intent to defraud any insurance company or other person files a statement of claim containing any materially false information, or conceals for the purpose of misleading, information concerning any fact material thereto, commits a fraudulent insurance act, which is a crime."

(OVER)